

UNITED STATES DISTRICT COURT

Southern

District of

New York

JOSE SALCEDO (A74838197)

SUMMONS IN A CIVIL ACTION

V.

DEPARTMENT OF HOMELAND SECURITY,
THE UNITED STATES CITIZENSHIP AND
IMMIGRATION SERVICES AND THE FEDERAL
BUREAU OF INVESTIGATION

CASE NUMBER:

08 CV 6512
JUDGE BAER

TO: (Name and address of Defendant)

U.S. Attorney's Office
86 Chambers Street
New York, NY

YOU ARE HEREBY SUMMONED and required to serve on PLAINTIFF'S ATTORNEY (name and address)

William H. Oltarsh, Esq.
OLTARSH & ASSOCIATES, P.C.
494 Eighth Avenue, Suite 1704
New York NY 10001
Tel: 212-944-9420
Fax: 212-944-9120

an answer to the complaint which is served on you with this summons, within 60 days after service of this summons on you, exclusive of the day of service. If you fail to do so, judgment by default will be taken against you for the relief demanded in the complaint. Any answer that you serve on the parties to this action must be filed with the Clerk of this Court within a reasonable period of time after service.

J. MICHAEL McMAHON

CLERK

Catherine Lapsley

(By) DEPUTY CLERK

DATE

JUL 22 2008

COPY RECEIVED

JUL 22 2008

U.S. ATTORNEYS SDNY

JUDGE BAER

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

-----X
JOSE SALCEDO (A74838197),
Petitioner

-against-

DEPARTMENT OF HOMELAND SECURITY,
THE UNITED STATES CITIZENSHIP & IMMIGRANT
SERVICES and the FEDERAL BUREAU OF
INVESTIGATION,

Respondents .

-----X



PETITION FOR MANDAMUS

To the Honorable Judges of the United States District Court, Southern District of New York: Petitioner, JOSE SALCEDO (A74838197), herein petitions this Court through this mandamus action to direct the Federal Bureau of Investigations (hereinafter referred to as the "FBI") and the Department of Homeland Security (hereinafter referred to as "DHS") through its branch the United States Citizenship & Immigration Service (hereinafter referred to as "USCIS") to finalize his background checks and petition for permanent residence forthwith.

This action arises from the respondents' violation of Section 6 of the Administrative Procedure Act, and 5 U.S.C. §555(b), and 28 U.S.C. §1331 and 1361.

JURISDICTION

1. The Administrative Procedure Act requires that administrative agencies have a duty to decide issues presented to them within a reasonable time. 5 U.S.C. §555(b).
2. 28 U.S.C. §1331 confers jurisdiction on the District Courts to review actions of federal agencies. 28 U.S.C. §1331 note 48. Reviewing courts have a duty to compel agency action unreasonably delayed. Neder v. F.C.C., 50 F.2d 182, 172 U.S. App. D.C. 1, (C.A.D.C. 1975).



3. Furthermore, 28 U.S.C. §1361 provides that “district courts shall have original jurisdiction of any action in the nature of mandamus to compel an officer or employee of the United States or any agency thereof to perform a duty owed to the plaintiff.”
4. Under Rule 81 of the Federal Rules of Civil Procedure, writs of mandamus are abolished: “Relief heretofore available by mandamus ... may be obtained by appropriate action or by appropriate action or by appropriate motion under the practice prescribed in these rules”.
5. Section 279 of the Immigration and Nationality Act, 8 U.S.C. Sec 1329 confers jurisdiction upon United States District Courts for review of all cases arising under the Immigration and Nationality Act, and the Administrative Procedures Act provides for judicial review of federal administrative agencies, authorizing the court to compel agency action unlawfully withheld or unreasonably denied.
6. Jurisdiction also lies under the United States Constitution because a benefit has been conferred to the Petitioners and the executive arm of the government is required to assure that the laws are discharged and complied with.

STATEMENT OF FACTS

7. Petitioner, JOSE SALCEDO (A74838197), a native and citizen of the Dominican Republic lived and continues to live in Bronx, New York. He applied for permanent residence through his wife, Aldona Salcedo on April 20, 2001. That I-130 was approved and is attached hereto as Exhibit “A”. Thereafter on May 9, 2002 Mr. Salcedo applied for permanent residence. See Exhibit “B”. Mr. Salcedo moved to reopen a prior Order of deportation, which was approved and the deportation case was terminated in an around May 15, 2006. Once removed there were no grounds of inadmissibility that would hinder

Mr. Salcedo from obtaining his residence.

8. Petitioner was scheduled for an adjustment interview on November 30, 2006 at which he and his wife appeared. See Exhibit "C".
9. Thereafter Petitioner's case has remained unfinalized. He sought to find out the status of his case on several occasions through inquiries to the USCIS. None of these inquiries resulted in a conclusion of the case. Following these numerous inquiries about the case, the USCIS has provided no indication that it is willing to adjudicate his petition.

RELIEF SOUGHT

10. Petitioner faces the possibility that his cases will remain unadjudicated for substantial additional time.
11. Petitioner has sought through numerous inquiries, congressional intervention and self-help to have his case finalized to no avail.
12. Petitioner has no means to compel the USCIS to complete those duties that are required of it by law. All attempts by the Petitioners to have his case finalized have been fruitless indeed.
13. The USCIS and the FBI are the only agency authorized to perform adjudications and the relevant background checks, respectively, and they have failed to do so; the petitioner's petition for adjustment of status has not been completed despite that petitioner has fulfilled all the requirements of the statute and laws and is eligible to become a permanent resident. There is no forum or means other than this mandamus action for petitioner to obtain relief. Because the USCIS case is "pending", petitioner cannot file any appeal within the agency itself, or an administrative appeal.

14. The USCIS and the FBI are statutorily mandated to perform background checks and to adjudicate permanent resident applications. These procedures must be performed within a reasonable time which has not occurred. More than four years have passed since the petitioner filed his application.
15. Further inaction could seriously harm the petitioner, as he is ineligible for numerous benefits afforded to United States permanent residents. For example, he can not leave the country until he becomes a permanent resident. Consequently, this administrative inertia is actionable, and the U.S. District Court has jurisdiction and the power to compel this agency's action and to compel a final adjudication of the petitioner's application. Jeffrey v. INS, 710 F. Supp. 486 (S.D.N.Y. 1989), Environmental Defense Fund, Inc. v. Haden, 428 F.2d 1093, 138 U.S. App.D.C. 391 (C.A.D.C. 1970).

WHEREFORE, Petitioner respectfully request through this Mandamus action that the United States Citizenship & Immigration Services and the Federal Bureau of Investigations be directed to immediately finalize the necessary background checks and grant the petitioner permanent residence.

Dated: June 30, 2008



William H. Oltarsh
Oltarsh & Associates, P. C.
Attorneys for the Petitioner
494 Eighth Avenue, Suite 1704
New York NY 10001
(212) 944-9420

THE UNITED STATES OF AMERICA

RECEIPT NUMBER EAC-01-157-54723		CASE TYPE - I130 IMMIGRANT PETITION FOR RELATIVE, FIANCE (E), OR ORPHAN
RECEIPT DATE April 20, 2001	PRIORITY DATE April 9, 2001	PETITIONER A42 704 178 SALCEDO, ALDONZA
NOTICE DATE April 3, 2003	PAGE 1 of 1	BENEFICIARY SALCEDO, JOSE A.
ALDONZA SALCEDO 2865 UNIVERSITY AVE #E-17 BRONX NY 10468		Notice Type: Duplicate Approval Notice Section: Husband or wife of U.S. Citizen, 201(b) INA

The above petition has been approved. The petition indicates that the person for whom you are petitioning is in the United States and will apply for adjustment of status. He or she should contact the local INS office to obtain Form I-485, Application for Permanent Residence. A copy of this notice should be submitted with the application.

If the person for whom you are petitioning decides to apply for a visa outside the United States based on this petition, the petitioner should file Form I-824, Application for Action on an Approved Application or Petition, with this office to request that we send the petition to the Department of State National Visa Center (NVC).

The NVC processes all approved immigrant visa petitions that require consular action. The NVC also determines which consular post is the appropriate consulate to complete visa processing. It will then forward the approved petition to that consulate.

THIS FORM IS NOT A VISA NOR MAY IT BE USED IN PLACE OF A VISA.

Please see the additional information on the back. You will be notified separately about any other cases you filed.

IMMIGRATION & NATURALIZATION SERVICE

VERMONT SERVICE CENTER

75 LOWER WELDEN STREET

SAINT ALBANS VT 05479-0601

Customer Service Telephone: (802) 527-4913



U.S.I.N.S.
FEE RECEIPT
A CENTURY OF SERVICE

05/09/02 N.Y.C.

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042709170*H
SALCINO, J H
FR PRINT \$ 50.00
I 4856 \$ 255.00
SUPP A \$ 100.00
I 765 \$ 120.00
SUBTTL \$ 125.00
TTLAHT 1425.00
MO \$ 200.00
MO \$ 700.00
MO \$ 25.00
CHANGE \$ 0.00

007502

Exhibit "B"



U. S. Department of Homeland Security
Bureau of Citizenship and Immigration Services

PRESENT THIS LETTER AT THE WORTH STREET ENTRANCE

JOSE SALCEDO

File Number: A74838197

2454 TIEBOUT AVENUE APT 6-K

Date: 11/1/2006

BRONX, NY 10468

Please come to the office shown below at the time and place indicated in connection with an official matter.

OFFICE LOCATION	26 FEDERAL PLAZA NEW YORK, NY 10278	Room No. 8-800	Floor No. 8TH
DATE AND HOUR		11/30/2006	7:45:00 AM
ASK FOR	IMMIGRATION EXAMINER		
REASON FOR APPOINTMENT	ADJUSTMENT OF STATUS (NOTE: This notice does not represent a decision on motions in any related matters or prior decisions.)		
BRING WITH YOU	SEE ATTACHMENTS		

IT IS IMPORTANT THAT YOU KEEP THIS APPOINTMENT AND BRING THIS LETTER WITH YOU. IF YOU ARE UNABLE TO DO SO, STATE YOUR REASON, SIGN BELOW AND RETURN THIS LETTER.

WARNING:

IF YOU CONSIDER DEPARTING FROM THE UNITED STATES TO ANY COUNTRY, INCLUDING CANADA OR MEXICO, BEFORE A DECISION IS MADE ON YOUR APPLICATION, CONSULT WITH THIS OFFICE BEFORE DEPARTURE SINCE A DEPARTURE FROM THE UNITED STATES WILL RESULT IN TERMINATION OF YOUR APPLICATION.

I am unable to keep the appointment because:

SIGNATURE

DATE

Attorney Name: STANLEY WALLENSTEIN ESQ
Attorney Address: 41-43 BEEKMAN STREET 3rd Floor
NEW YORK, NY 10038-

Very truly yours,

Mary Ann Gantner
District Director - CIS
New York District

Exhibit "C"

VISAS	OBSERVACIONES Observations Remarques
46	<p>47</p> <p>A74 838' 197 I 485 Pending DAO Than NWC 245 11/30/00</p>

State of New York County of New York)

I, Jennifer Oltarsh, an attorney duly admitted to practice law before the courts of the State of New York hereby confirm under the penalty of perjury that that I served a copy of the within

Petition for Review

by having said documents personally served on:

the US Attorney's Office
86 Chambers Street
New York, NY

on this ~~22nd~~ day of July, 2008



Jennifer Oltarsh